

**CHANGE OF JUDGE — Rule 10.2 and Rule 17.4(g), Arizona Rules of Criminal Procedure — Peremptory changes of judge — Overview**  
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**Both the State and the defense have the right to a fair judge.**

Parties in a criminal litigation have a right to a fair and impartial judge.

*State v. Ellison*, 213 Ariz. 116, 128, ¶ 35, 140 P.3d 899, 911 (2006) (citing *State v. Mincey*, 141 Ariz. 425, 442, 687 P.2d 1180, 1197 (1984)). To secure this right, litigants may move for a change of judge with or without cause. In both contexts, "any provision regarding the disqualification of judges must be given strict construction to safeguard the judiciary from frivolous attacks on its dignity and integrity and to ensure orderly function of the judicial system." *State v. Perkins*, 141 Ariz. 278, 286, 686 P.2d 1248, 1256 (1984).

**The State and the defense each have a right to one, and only one, peremptory change of judge.**

The Arizona Rules of Criminal Procedure provide the procedural vehicle by which a party may move for a change of judge without cause. This is called a peremptory notice. Rule 10.2, Arizona Rules of Criminal Procedure, sets out the procedure for requesting a peremptory change of judge.

**Rule 10.2. Change of judge upon request**

**a. Entitlement.** In any death penalty case, any party shall be entitled to request a change of judge as a matter of right no later than ten (10) days after the state files a notice of intention to seek the death penalty. In any criminal case other than a death penalty case, each side is entitled as a matter of right to a change of judge. Each non-death penalty case, whether single or consolidated, shall be treated as having only two sides; except that, whenever two or more parties on a side have adverse or hostile interests, the presiding judge or that judge's designee may allow additional changes of judge as a matter of right. Notwithstanding the foregoing provision, the right to a change of judge shall be

inapplicable to Rule 32 petitions for post-conviction relief or remands for resentencing.

**b. Procedure.** A party may exercise his or her right to a change of judge by filing a pleading entitled "Notice of Change of Judge" signed by counsel, if any, stating the name of the judge to be changed. The notice shall also include an avowal that the request is made in good faith and not:

1. For the purpose of delay;
2. To obtain a severance;
3. To interfere with the reasonable case management practices of a judge;
4. To remove a judge for reasons of race, gender or religious affiliation;
5. For the purpose of using the rule against a particular judge in a blanket fashion by a prosecuting agency, defender group or law firm (*State v. City Court of Tucson*, 150 Ariz. 99, 722 P.2d 267 (1986));
6. To obtain a more convenient geographical location; or
7. To obtain advantage or avoid disadvantage in connection with a plea bargain or at sentencing, except as permitted under Rule 17.4(g).

The avowal shall be made in the attorney's capacity as an officer of the court.

**c. Time for Filing.** A notice of change of judge in a non-death penalty case shall be filed within ten days after any of the following:

- (1) Arraignment, if the case is assigned to a judge and the parties are given actual notice of such assignment at or prior to the arraignment;
- (2) Filing of the mandate from an Appellate Court with the clerk of the Superior Court;
- (3) In all other cases, actual notice to the requesting party of the assignment of the case to a judge.

Notwithstanding the foregoing provision, if a new judge is assigned to a non-death penalty case fewer than ten (10) days before trial (inclusive of the date of assignment), a notice of change of judge shall be filed, with appropriate actual notice to the other party or parties, by 5:00 p.m. on the next business day following actual receipt of notice of the assignment, or by the start of trial, whichever occurs sooner.

**d.** At the time of the filing of a notice of change of judge, the parties shall inform the court in writing if they have agreed upon a judge or judges who are available and are willing to have the action assigned to that judge. An agreement of all parties upon such judge may be honored and, if so, shall preclude further changes of judge as a matter of right unless the agreed-upon judge becomes unavailable. If no judge has been agreed upon, then the presiding judge shall immediately reassign the action.

If a judge to whom the action has been assigned by agreement later becomes unavailable because of a change of calendar assignment, death, illness, or other

legal incapacity, the parties shall be restored to their rights under this rule as they existed immediately before the assignment of the action to such judge.

Peremptory changes of judge have been a mainstay of Arizona jurisprudence since the early part of this century. See *Gee Long v. State*, 33 Ariz. 420, 265 P. 622 (1928); *Shew Chin v. State*, 33 Ariz. 419, 265 P. 621 (1928). In *Sam v. State*, 33 Ariz. 383, 265 P. 609 (1928), the Arizona Supreme Court found that a defendant has a right to a change of judge.

Peremptory challenges under Rule 10.2 do not require a demonstration of cause, nor do they require that a prosecutor avow that any such challenge is founded on a good faith belief that the judge may not deal with the issues in controversy impartially. In *State v. Greenlee County Justice Court*, 157 Ariz. 270, 756 P.2d 939 (App. 1988), the Court of Appeals found that a superior court judge had no authority to require county prosecutors to avow a good faith basis for their challenges of a justice of the peace. So long as the challenges were not an abuse of the right to seek changes under the rules, the challenges were permissible. In *Bergeron ex rel. Perez v. O'Neil*, 205 Ariz. 640, 74 P.3d 952 (App. 2003), the court held that a judge could not order counsel to divulge their reasons for filing a notice under amended Rule 10.2, if counsel provided the avowal required by Rule 10.2(b).

Each party has the right to one, and only one, peremptory change of judge. Rule 10.2, Ariz. R. Crim. P. "Once a defendant has exercised one peremptory challenge, there are no more." *Hill v. Hall ex rel. County of Yuma*, 194 Ariz. 255, 258 ¶ 10, 980 P.2d 967, 970 ¶ 10 (App. 1999). A party gets only one peremptory change of judge whether that change is exercised under Rule

10.2 or Rule 17.4(g). Rule 17.4(g) provides a right to change of judge when a defendant's plea is withdrawn after the presentence report has been submitted:

**g. Automatic Change of Judge.** If a plea is withdrawn after submission of the presentence report, the judge, upon request of the defendant, shall disqualify himself or herself, but no additional disqualification of judges under this rule shall be permitted.

A defendant who exercises his right to a peremptory change of judge under Rule 17.4(g) is not entitled to another peremptory change of judge under Rule 10.2. In *Fiveash v. Superior Court*, 156 Ariz. 422, 424, 752 P.2d 511, 513 (App. 1988), the defendant entered a guilty plea, but at sentencing the trial court rejected the plea, stating that its sentencing provisions were inappropriate. The defendant exercised his right to change of judge under Rule 17.4(g) and the case was reassigned to another judge for trial. The defendant then tried to challenge the new judge under Rule 10.2. He argued that Rule 17.4(g) merely said that no other disqualifications were allowed under that rule, and that therefore he should be allowed another automatic change of judge under a different rule, Rule 10.2. The Court of Appeals rejected that argument, reasoning that Rule 17.4(g) gives a defendant "the opportunity for a peremptory change of judge which would otherwise be unavailable to him because of the expiration of the time limits of Rule 10.2 and because of his participation in the change of plea proceeding." *Id.* at 425, 752 P.2d at 514.

A defendant is entitled to a change of judge under Rule 17.4(g) if the plea is withdrawn after the presentence report has been submitted, whether the court rejects the plea or the defendant withdraws from the plea. See *Chavez v. Superior Court*, 181 Ariz. 93, 887 P.2d 623 (App. 1994). But a defendant is not

entitled to a change of judge under Rule 17.4(g) unless the presentence report has actually been submitted. In *Scarborough v. Superior Court*, 181 Ariz. 283, 889 P.2d 641 (App. 1995), the judge rejected the plea agreement as too lenient after the victim made a statement in court. Although no presentence report had been submitted, the defendant moved for a change of judge under Rule 17.4(g), arguing that the judge had received the same sort of information from the victim that the judge would have ordinarily obtained through the presentence report. The Court of Appeals rejected that argument, stating, “Rule 17.4(g) simply does not apply in this situation.” *Id.* at 287, 889 P.2d at 645.

In *State ex rel. Thomas v. Gordon*, 213 Ariz. 499, 144 P.3d 513 (App. 2006), the County Attorney had exercised a peremptory change of judge before trial under Rule 10.2. Defendant’s conviction was later overturned and the case remanded for a new trial. The County Attorney then sought a change of judge under Rule 10.4(b), which states:

**b. Renewal.** When an action is remanded by an Appellate Court for a new trial on one or more offenses charged in the indictment or information, all rights to change of judge or place of trial are renewed, and no event connected with the first trial shall constitute a waiver.

However, the court concluded that a party is entitled to only one change of judge without cause during the life of a criminal case, and the State had already exercised its peremptory notice before trial. *Id.* at 505, 144 P.3d at 519. “By statute and rule, a party’s right in a criminal case to a change of judge as a matter of right has been limited to one. This ‘one and only one’ approach has been consistently followed by Arizona courts when presented with questions

regarding a party's right to a peremptory challenge in a criminal proceeding." *Id.* at 503, 144 P.3d at 517.

A defendant is not entitled to notice a judge when a case is remanded only for resentencing. Rule 10.2(a), Ariz. R. Crim. P.; *Nikont v. Hantman*, 211 Ariz. 367, 121 P.3d 873 (App. 2005). If a case is dismissed and refiled, the rights of the parties under Rule 10.2 begin anew. *Godoy v. Hantman*, 205 Ariz. 104, 106, 67 P.3d 700, 702 (2003).

**Peremptory challenges apply to all judges in all courts.**

Although peremptory challenges were once thought only to apply to courts of record, Rule 10.2 is applicable to all courts, record or non-record. *Cain v. City Court of City of Tucson*, 135 Ariz. 96, 659 P.2d 649 (1983) (overruling *Anagnostos v. Truman*, 25 Ariz. App. 190, 541 P.2d 1174 (1975) and holding that Rule 10.2 applies to all courts). "The right attaches whenever an action is assigned to a new judge, even when the case is reassigned after entry of a guilty plea." *State v. Tackman*, 183 Ariz. 236, 239, 902 P.2d 1340, 1343 (App. 1994).

However, peremptory challenges apply only to judges — not to others who may be assigned by the court to aid it in performing its duties more efficiently. In *Tackman*, the defendant tried to raise a peremptory challenge under Rule 10.2 against a "special master" whom the trial court had assigned to conduct a restitution hearing. The Court of Appeals found that the defendant could not challenge the "special master" because the case was never assigned to a different judge. The Court reasoned that the trial court had delegated the task of holding the evidentiary hearing to the special master, who then was to report his

findings to the trial court. The Court noted that the trial court, the ultimate fact-finder, was subject to a peremptory challenge. But a “special assignment judge,” appointed to determine whether defense counsel should be disqualified, could be noticed under Rule 10.2. *Bolding v. Hantman*, 214 Ariz. 96, 148 P.3d 1169 (App. 2006).

**The right to peremptory change of judge can be waived by failing to assert it within the ten-day time limit of Rule 10.2(c).**

A party who fails to exercise his peremptory right to a change of judge within the ten-day period provided by Rule 10.2(c) forfeits his right to a peremptory challenge. However, loss of the right to peremptory challenge in no way affects that party's right to a change of judge for cause under Rule 10.1. *Hill v. Hall ex rel. County of Yuma*, 194 Ariz. 255, 257 ¶ 6, 980 P.2d 967, 969 ¶ 6 (App. 1999). Note, however, that the Arizona Supreme Court has stated that strict compliance with the time limit “can be waived where the peremptory challenge is made diligently and as soon as practicable.” *State v. Poland*, 144 Ariz. 388, 394, 698 P.2d 183, 189 (1985).

Consolidation of several criminal cases does not invalidate a defendant's timely motion for a change of judge. *Farr v. Superior Court*, 114 Ariz. 485, 487, 562 P.2d 365, 367 (1977). In *Farr*, the Arizona Supreme Court ruled that when two or more cases against a defendant are consolidated in a single court, a defendant who was granted a change of judge in one case retains the right to seek a peremptory change of judge in the consolidated or subsequent cases.

The right for change of judge in each case is not foreclosed by the mere fact of consolidation. *Id.*

A party who makes a request for change of judge within ten days of the assignment of that judge is deemed to have made a timely request. Rule 10.2(c), Ariz. R. Crim. P. In *State v. Barnes*, 118 Ariz. 200, 575 P.2d 830 (App. 1979), the defendant pleaded guilty to several charges and the trial court set a date about five weeks later for entry of judgment and sentencing. Some days after the change of plea hearing, the case was reassigned to another judge for the judgment and sentencing. The State filed a change of judge request thirteen days after the change of plea hearing. The Court of Appeals found that the State's motion was timely because the motion had been filed within ten days of when the State had learned of the assignment of the new judge. *See also Nevarez v. Superior Court of Cochise County*, 151 Ariz. 472, 728 P.2d 691 (App. 1986) (holding that the ten-day time period will be tolled for a party who is unrepresented by counsel during the ten-day period).

Intervening legal proceedings do not, in and of themselves, toll the time limits during which a request for change of judge may be filed. In *State v. Poland*, 144 Ariz. 388, 698 P.2d 183 (1985), the State sought to dismiss the case after a remand from a higher court; the trial judge later denied the motion to dismiss. The defendant sought a change of judge under Rule 10.2 but did not file it until 54 days after the appellate court's mandate. The State opposed the motion. Defense counsel explained that he had relied on the dismissal motion to toll the filing deadlines until the court reached a decision on the dismissal. Further, the



defendant asserted that by filing the motion to dismiss, the State had waived any right to object to the timeliness of the change of judge motion. The Arizona Supreme Court was not persuaded by the defendant's reasoning and found: (1) the State had not waived any right to object on the basis of timeliness; and (2) the defendant's motion was untimely because the intervening legal motions did not extend the time required for filing a timely motion.

A critical consideration in determining the timeliness of a peremptory challenge is the date on which the parties actually received notice of the assignment of a particular judge. For example, in *State v. Cozad*, 113 Ariz. 437, 556 P.2d 312 (1976), a statement by the judge from whom the case was to be reassigned that another specific judge would hear the case was sufficient to trigger the beginning of the ten-day filing deadline. *But see State v. Williams*, 123 Ariz. 112, 597 P.2d 1015 (App. 1979) (ambiguous statement by judge from whom case was being reassigned concerning the possibility of another judge's hearing the case did not trigger the ten-day limit). The ten-day rule is extended by five days when the United States mail is used to provide notice to the parties. Rule 1.3(a), Arizona Rules of Criminal Procedure. In *State v. Keel*, 137 Ariz. 532, 672 P.2d 197 (App. 1983), the Court of Appeals, citing Rule 1.3, noted that the time limit is extended to fifteen days when the notice is mailed to the parties.

**A party that participates without objection in a contested hearing before the challenged judge waives his right to a change of judge.**

Under Rule 10.4(a), Arizona Rules of Criminal Procedure, a party waives his rights to a change of judge under Rule 10.2 if he participates without objection in any contested matter in the case before the challenged judge. *State*

*v. Carver*, 160 Ariz. 167, 171-72, 771 P.2d 1382, 1386-87 (1989). Rule 10.4(a) provides in part:

**a. Waiver.** A party loses the right under Rule 10.2 to a change of judge when the party participates before that judge in any contested matter in the case, an omnibus hearing, any pretrial hearing, a proceeding under Rule 17, or the commencement of trial.

However, in *Medders v. Conlogue*, 208 Ariz. 75, 90 P.3d 1241 (App. 2004), the court held that appearing before a judge hearing a motion, but not assigned to the case, did not constitute waiver.

**Procedures for transferring the case to another judge.**

Once a judge has been challenged, the case is “immediately” transferred to the presiding judge for reassignment. The procedure for reassigning the case to a different judge is set forth in Rule 10.5, Arizona Rules of Criminal Procedure. Subsection (a) of that Rule provides:

**a. Designation of New Judge.** After a request under Rule 10.2 has been filed or a motion under Rules 10.1 or 10.3 granted, the case shall be transferred immediately to the presiding judge who shall reassign the case to a new judge. No further change of judge under Rule 10.2 shall be permitted to the party making such request. If there are multiple defendants, notice of change of judge by one or more defendants pursuant to Rules 10.1 or 10.2 does not require a change of judge as to the other defendants, even though such notice of change of judge may result in severance for trial purposes.